LESSER KNOWN CHURCH LAW CASES

By Archibald Macwhirter F.S.A. Scot.

(*N.B.*—"Court" in the following paper refers in every case to the Court of Session.)

I

Few historians seem to be aware of the vast accumulation of interesting matter contained in the volumes of the *Scottish Law Reports*. These include accounts of cases concerning organisations of every description, which throw, at times a vivid light on matters not otherwise recorded.

In Scotland Churchmen have never shown any disinclination to go to law. The result is that, if one delves deeply into the volumes of the Reports, interesting facts can be discovered relating to controversies which have from time to time disturbed the existence of most Scottish denominations. In this paper attention will be drawn to a few cases relating to smaller ecclesiastical bodies which I have noted during many years reference to the Reports.

II

Little has been written regarding some interesting features in the history of the Episcopal Church in Scotland. The final Non-jurors ; the Licensed congregations ; and the " English " chapels in Scotland, all of which groups had a colourful background, have received little attention from historical writers in the past. The first group of cases cast some light on these off-shoots of the main episcopal stream.

Macintosh v. *The Trustees of The Scottish Episcopal Fund* is not a reported case, but the original process is available at the Register House. I believe that the facts contained in it have not been used by any previous writer.

Rev. Donald Macintosh, pursuer in the action, has an outstanding claim to a niche in the annals of Scottish Church History. He was the last Non-Juring Priest in Scotland and also, as far as I am aware, in Britain. In 1788 two priests—in London and Bath—were all that remained of the once extensive Non-Juring Communion in England, and nothing is known of their activities after that time. Mr. Macintosh received licence " as a parson " in 1781 from that uncomprising Jacobite,

Bishop Rose of Dunblane on the recommendation of Rev. James Taylor "on account of his sound and orthodox principles, and likewise his knowledge of the Gaelic or Earse language to assist the said James the licence being restricted to those parts of his charge in the Strath Tay about the Bridge of Kynachan and Blair of Atholl."

Seven years after Mr. Macintosh received his licence a marked change occurred in the political outlook of the Episcopal Communion in Scotland. This was evidenced in the decision of the Bishops to pray henceforth for the members of the Ruling House, thus bringing to an end their traditional attachment to the house of Stuart. Bishop Rose was the only dissenter from this revisal of policy, and his mental powers were fast waning. Having suffered, along with other members of the communion, throughout his life for allegiance to the Stuarts, Bishop Rose was determined to establish a succession of Non-Juring Bishops and thereby transmit their loyalty to future generations. In accordance with this plan, he consecrated a priest named Brown from Montrose as a Bishop. The consecration took place in Bishop Rose's private chapel at Doune, and, according to the Canons of the Church, the elevation was irregular, as these required a minimum of three Bishops to participate on such an occasion.

The remaining die-hard Jacobites looked to these men for leadership, and their sympathisers were located principally in Glasgow, Edinburgh and Perthshire. It may be added that when Bishop Rose was interrogated by his brother bishops regarding the consecration of Mr. Brown, he was in such a muddled mental state that he denied all knowledge of the event, and suggested that the deed might have been performed by his sister!

One of the few episcopal acts performed by Bishop Brown was the ordination of Mr. Macintosh. When the legal action under review was commenced in the closing years of the eighteenth century Mr. Macintosh had abandoned the wilds of North Perthshire for the more cultured atmosphere of the Capital where he was "Episcopal Minister in Bailie Fyffe's Close." Here his flock was composed of the Jacobites who had withdrawn from the Episcopal congregations in Edinburgh following the decision of 1788 and the repeal of the Penal Acts against the Episcopalians in 1792. His own description of his congregation in the action is "that though respectable, it is far from numerous," while his opponents stated that "he has only a handful of old people who attend him"—two delightfully different ways of stating the same fact.

The ground of the action concerned the administration of the Scottish Episcopal Fund. This had been set on foot very soon after the Revolution of 1688 by some of the deprived bishops in order to give relief to Episcopal

Clergy who were then ejected from their livings, and afterwards to such Episcopal Clergy under the succeeding Bishops who should not derive sufficient maintenance from their congregations. The sympathies of the trustees being with the Non-Juring section of the Church, Mr. Macintosh was awarded a sum of £9 annually from the fund. On a change of trustees, however, the payment was stopped. In his pleadings, Mr. Macintosh claimed that " as the only remaining non-jurant he had the only true and undoubted right to the fund, or at least to the sum of £9 *per annum* which he had hitherto received." The trustees argued that Mr. Macintosh was not, in fact, an Episcopal minister having been ordained by Bishop Brown, who, having been irregularly consecrated by Bishop Rose, had withdrawn from the Communion of the Church. It appears from the pleadings that one other priest, in Glasgow, had sided with Bishops Rose and Brown, but had, after a year or two, returned to the main body of the Church. Finally, the trustees offered Mr. Macintosh the sum of £20 in full settlement of all claims he might have against them, and on 11th March, 1801, the Court pronounced an interlocutor ordering the sum to be paid into Court in the form of a note drawn on Sir William Forbes and Company, Bankers. This was to be endorsed in favour of Mr. Macintosh, but a proviso was added that if he did not take up the note within seven weeks the trustees would be at liberty to take it back and cancel the endorsement. At the same time, the Court strongly advised Mr. Macintosh to accept of the offer, but it does not appear from the process whether or not he did so. It seems unlikely, however, that his principles would allow him to be bought out in this fashion. Mr. Macintosh, who was an accomplished Gaelic scholar and author of works in that language, died in 1808, bequeathing his library to the Town of Dunkeld. The books are now housed in the Sandeman Library at Perth, where, unfortunately, they are not available to students.

It is interesting to consider the lack of encouragement extended by the Court to Mr. Macintosh in relation to the view taken in several later cases, including the " Free Church " case of 1904. If adherence to principles was the yardstick by which entitlement to benefit from the fund was to be measured, it seems that he and his followers, however the smallness of their number, were the party adhering to the principles of the Episcopalian Church as they were prior to the decision of 1788 to pray for the Ruling Monarch. In the light of the later decisions the main body of the Church would appear to have, by altering one of the cardinal points in its policy, abandoned its right to participation in such a fund.

In any event, we can spare some sympathy for the lone presbyter ministering in Bailie Fyffe's Close to those who, like himself, clung

tenaciously to the traditions of a lost cause. No hope of a revival for those holding their views could possibly be entertained at this stage, and by their own actings the little group was condemned to stand in isolation until age and death brought about its disintegration.

III

Peake v. *The Association of English Episcopalians in Scotland* (22 S.L.R. at p. 3) is the second of this series. From the record in this action we learn that a number of the "English" Episcopalians in Scotland formed an association, principally for the purpose of obtaining the services of a retired colonial bishop of the Church of England to administer the rite of confirmation in their congregations. Some of the churches attached to the new body had existed for a long period of years and a number were descended from the earlier "Licensed Episcopal" congregations of which further information will be given in the next section. For the support of a bishop efforts were made to provide a fund which would allow such bishop as might be obtained an annual allowance of £500. The following churches comprised the Association—St. Thomas', Edinburgh; St. Vincent, Edinburgh; St. Jude's, Glasgow; St. Silas, Glasgow; St. Peter's, Montrose; St. James', Aberdeen; St. John, Dundee. The English Church, Nairn, and private chapels at Dunoon, Gatehouse and Wemyss Bay.

The Association secured the services of Bishop E. H. Beccles, D.D., who had retired from his previous diocese in Sierra Leone. In April 1877, however, the Convocations of York and Canterbury passed resolutions censuring the "intrusion" of Bishop Beccles into the dioceses of the Scottish Bishops. The resolutions were passed "all but unanimously and were supported by Evangelicals and High Churchmen alike." This had the effect, as will be described later, of ending the connection of at least one congregation with the Association. Most of the others, however, continued to receive the services of Bishop Beccles.

In December 1882 the Primus and other Bishops of the Episcopal Church in Scotland published a declaration with reference to certain canons of that Church to which exception had been taken by the "English Episcopalians" in Scotland. The purpose of this statement was (first) to qualify the effect of subscriptions to the canons in the sense that clergymen and others subscribing the canons were no longer to be regarded as being committed by their subscription to the canons to an approval of

the distinctive peculiarities of these canons or to the acceptance of doctrine which might be in any way inconsistent with the book of Common Prayer and (second) to permit the engaging in religious worship at informal meetings for devotion without requiring that the Order of Service should be the same as that at the regular stated services.

Following on this declaration, the majority of the congregations attached to the Association decided that their members could now conscientiously avail themselves of the services of a Scottish Bishop, and that the assistance of Bishop Beccles was no longer necessary. Accordingly, at a meeting held on 23rd April, 1884, a resolution was passed declaring that it was no longer expedient to continue the Association ; that the same be therefore dissolved and that the balance of the Bishops fund be repaid to the contributors thereof or their representatives in proportion to the amount of their respective contributions. Two members—Dr. Peake, incumbent of St. Silas, and Dr. Connolly, incumbent of St. Peter's—dissented, and raised thereafter an action of suspension and interdict against the Association and its officials. The Dissenters claimed that the resolution passed at the meeting was *ultra vires* and illegal ; that the Respondents were only entitled to apply the fund in terms of the constitution and that they were not entitled to devote any of the fund of the said Association except with the unanimous consent of the whole Association. In their opposition, Dr. Peake and Dr. Connolly were supported by the proprietor of the private chapel at Wemyss Bay.

On 8th July, 1884, the Court found in favour of the minority. In a note to the interlocutor Lord McLaren said, in speaking of the proposed return of the contributions to the fund to the donors, " Of course for this purpose both the donors or their heirs have a resulting interest in the fund, but here there is no failure of the purpose because there are still two English Episcopalian congregations in Scotland who desire the services of an English Bishop and who insist in continuing a state of complete separation from the Scottish Communion on the grounds and principles of which their Association was constituted. While for these reasons I shall grant interdict against the contemplated dissolution of the Association and allocation of its funds I do not wish to prejudge the consideration of the question whether if they are providing for the spiritual requirements of the congregations who keep aloof from the Scottish Communion the surplus income of the Association may not be employed in adding to the income of one or more of the Bishops of the Scottish Communion in the less wealthy dioceses. . . . I venture to suggest that this is a question which may be settled by the parties interested without recourse to a Court of Law."

IV

Details of the history of one of the "Licensed" Episcopal Chapels of former times is included in the report of *Burnett* v. *St. Andrews Episcopal Church, Brechin, and Others* (15 R, p. 723). For some time after the Revolution of 1688, the episcopal incumbent of the Parish Church of Brechin continued to officiate. However, early in the following century an Episcopal Congregation was organised and in 1743 a chapel was set apart for its use under the Act of Toleration (10 Anne, cap. 7). Under this act persons of the Episcopal persuasion in Scotland were permitted to assemble for divine worship provided *inter alia* that no one who officiated was to exercise the functions of a pastor unless he possessed and had registered a Letter of Orders from some Protestant Bishop. Shortly after the erection of the chapel occurred the rising of 1745-1746, in which the part taken by the great body of the Scottish Episcopalians having brought them into great disfavour with the government the *Act* 19 *Geo. II c.* 38 was passed "more effectually to prohibit and prevent pastors and ministers from officiating in Episcopal meeting-houses in Scotland, without duly qualifying themselves according to law; and to punish persons for resorting to any meeting-houses where such unqualified pastors or ministers shall officiate." By this statute the Sheriffs were directed to enquire into the number of Episcopal meeting-houses within their bounds, and to cause lists to be made of the same, copies of which were to be transmitted to each of the Houses of Parliament. The pastors of episcopal congregations were directed to take the Oaths to Government, and obtain a certificate that they had done so from the Sheriff Clerk—a copy of which certificate was to be affixed to the door of the meeting-house and another to some conspicuous place inside. Ministers were ordered to pray for the King, his heirs and successors by name, and for all the royal family, in the form of words contained in the liturgy of the Church of England. Magistrates were enjoined immediately to shut up all meeting-houses where the pastor did not comply with these requirements. All pastors officiating without qualification were liable to imprisonment and transportation. Penalties were imposed on laymen frequenting such meeting-houses. No letters of orders of any clergyman were to be sufficient, unless such as had been given by some Bishop of the Church of England or of Ireland. In consequence of these enactments, the Scottish Episcopal Church almost entirely ceased to function. Several congregations, one of which was that of Brechin, secured the services of an English or Irish parson and became a "Licensed Episcopal" or "Qualified English" chapel.

After the passing of the Act of Relief (32 *George III, c.* 63) in 1792, many congregations of the Scottish Episcopal Church were reformed, and such a revival took place in Brechin. In few cases, however, did an amalgamation of the revived Scottish congregations with the former licensed congregations take place, and in most cases the congregations were indifferent, if not hostile, to each other. Brechin Qualified Chapel continued to function as before until 1820 when the last pastor died. Although a number of members had withdrawn to the Scottish Congregation, a good number remained on the roll at this time, when the following Qualified Chapels were in operation in Scotland :—

Kelso (William Kell).	Montrose (J. Dodgson).
Perth (H. A. Skeete, A.M.).	Brechin ——
Dundee (William Hawthorn).	Aberdeen (J. Cordiner, A.M.).
	(W. Wilkinson).

For a period of ten years following on the death of the last pastor until 1830, services were continued in the chapel and efforts made, without success, to secure a new minister from England or Ireland. A considerable debt was due by the congregation, and in these circumstances the trustees of the Licensed Congregation entered into a Contract of Wadset and Disposition in Security by which, in return for the sum of £145, they wadsetted and disponed the chapel to the managers of Brechin Relief congregation. By the terms of the deed the chapel was to be redeemed by the grantors or their successors at Whitsunday 1887 on payment to them of £145, but provided that the chapel was to be used solely as a chapel or place of worship for the said Relief congregation and for no other purpose whatever, and that, should the said Relief congregation cease to be in connection with the Relief Synod of Scotland or should cease to maintain religious worship regularly in said Chapel, then the said wadset right should *ipso facto* cease and determine and the subjects revert to the disponers or their foresaids they being bound to pay the said principal sum of £145. On receipt of this sum, the managers the Licensed congregation made payment of the debts due by them and no further services were held. The trustees, however, continued in office. At the Union of the Relief and United Associate Synods in 1847, which resulted in the formation of the United Presbyterian Church, Brechin Relief Church accompanied her sister congregations into the new body.

In 1878, on the application to the Court of the last surviving trustee a Judicial Factor was appointed on the estates of Brechin Licensed congregation. The factor thereupon made application to the managers of the United Presbyterian congregation for a re-conveyance of the chapel on the ground that the wadset right had terminated on account of failure

to comply with the conditions in respect *inter alia* of the Relief congregation having entered the union of 1847. On receipt of the redemption price of £145 the chapel was re-conveyed to the Factor. In the interval—in 1876—The United Presbyterian congregation had erected a new church and had ceased to maintain religious worship in the former Licensed Chapel.

On obtaining possession, the Judicial Factor sold the chapel for £500, and after reimbursing himself for the wadset redemption price and all other expenses a balance of £176 remained in his hands. He now raised a petition in the Court praying for an Order settling the destination of the balance. Two claimants to the fund appeared—the Vestry of St. Andrews' Episcopal Church and the Managers of High Street United Presbyterian Church, Brechin.

The interesting point arising from the case is the claim of the United Presbyterian Congregation that when the Licensed Episcopal Congregation had ceased to meet as a separate body it had become united to the Relief congregation. They stated that a large majority of the members had continued to attend the chapel under presbyterian auspices. This fusion of an episcopal congregation and a presbyterian congregation must be a very rare occurrence, and is perhaps unique in the whole field of Scottish Church History.

The St. Andrews' Episcopal Church in answers did not admit that the members of the Licensed Chapel who had joined the Relief Church constituted a majority. The claim of this congregation was that from 1792, when the Scottish congregation was re-established until 1830, when the Licensed Congregation ceased to meet, a steady flow of members had withdrawn from the latter to join the former body.

The Court, without allowing the United Presbyterian Congregation a proof of their averments, found for the Vestry of St. Andrews' Church, the interlocutor stating :—" The short ground of judgment seems to be that the Chapel was built in the year 1743 by and for the use of the Episcopalians in Brechin ; and that the monies arising from the sale of the chapel in consequence of its disuse and the failure of the trust on which it was held ought to be given to the only parties which now represent the Episcopalians of Brechin.

V

Another action concerning the " English " congregations is *Bannerman* v. *Bannerman's Trustees* (23 *R*, *p*. 959).

Miss Georgina Bannerman, who died in 1876, directed her trustees to invest the sum of £3,000 the interest of which was to be paid to the incumbent of St. James' Episcopal Church, Aberdeen, for the purpose of augmenting his stipend, "but that only so long as he continues to discharge the duties of incumbent to the satisfaction of my trustees, and so long as the congregation worshipping in said church shall not be united to or in connection with the Scottish Episcopal Church and so long as the services and mode of worship shall be strictly evangelical and devoid of any practices of a ritualistic description as are in use among the party in the Church of England known as the High Church party." In the event of there being, in the opinion of Miss Bannerman's Trustees a failure to comply with any of these conditions the said capital sum of £3,000 was to be divided amongst her residuary legatees.

The action was raised at the instance of Miss Bannerman's residuary legatees in 1896. They claimed that St. James' congregation had forfeited the bequest in respect that the congregation was now united to, or at all events, in connection with the Episcopal Church of Scotland. The action was defended by the sole acting trustee of Miss Bannerman and by the minister and managers of St. James' congregation. In the course of the proof, some information regarding this English congregation was revealed.

St. James' Church was an offshoot of the older St. Paul's (English) congregation in Aberdeen, and had been set up in 1854. By the deed of Constitution the chapel was to be "used solely and exclusively for divine service and the ministrations of sacred ordinances in strict conformity with the Articles of the United Church of England and Ireland." From 1854 to 1877, as was apparently the custom in the other "English" congregations, young people who were due for confirmation either travelled to England to receive the rite from a bishop of the Church of England, or were admitted to communion without confirmation. In Miss Bannerman's own case, the rite was performed by the Bishop of Carlisle.

In 1877, the congregation hoped to benefit from the services of Bishop Beccles, but, on the declaration of censure being intimated by the Convocations of Canterbury and York it was decided not to accept his services. In consequence of this, the incumbent of St. James on his own responsibility, applied for and obtained a licence from the Scottish Bishop of Aberdeen, and each succeeding incumbent followed his example. Young people requiring Confirmation were confirmed by the Bishop of Aberdeen in one or other of the Episcopal Churches in the city (excluding St. James'). So far as the congregation itself was concerned no union with the Scottish Church had taken place, but from the actings above described the Court

held that if no " union " had taken place, the act of the incumbent in " taking a licence from a Scottish Bishop and the presenting of the young people to him for confirmation constituted a " connection with " the Scottish Church and in consequence, St. James' congregation forfeited the interest on the legacy.

I hope that these brief details may be the means of interesting others in the history of the Licensed and English Episcopal congregations, as I am sure their history could form the basis for further writings.

VI

The last case to which I wish to refer is that of *The General Assembly of the General Baptist Churches* v. *Taylor* (3 *D. p.* 1030).

David Taylor, builder in Perth, died in 1832, leaving a testament which stated *inter alia*, "I give and bequeath unto the general Unitairin Baptist Assembly the sum of on thousand pounds sterling the intrest of which is to be applied soly to the maintenance of a preacher in the city of Perth." The legacy not having been paid, an action was commenced by the General Assembly of the General Baptist Churches against William Taylor as heir and executor of and as otherwise representing the said David Taylor.

A defence taken by Taylor was that the action was not maintainable inasmuch as its object was the promotion of purposes reprobated by law —the object of the legacy being the propagation of Unitarian tenets " which are not only not recognised by the state, but are condemned by the law of the country, as directly and inveterately hostile to the creed which forms part and parcel of the law of the land." On this point the Lord Ordinary pronounced the following interlocutor :—" Repels also the fourth or last of said defences, in respect that the purpose for which the legacy is left is not a criminal or illegal purpose, or one which can in any sound sense, be regarded as dangerous to good morals, or offensive to decency or good order." In a note thereto he states :—" There can be no doubt that by the existing law, the sect of Unitarians is entitled to the fullest measure of toleration and it would be absurd to hold that there was anything to corrupt virtue in tenets which have been advocated in our own day by men of such eminent talents, exemplary piety, and pure lives as Price, Priestley, and Channing, and to which there is reason to think that neither Milton nor Newton were indifferent. Those who belong to the great establishment of the Church of England, it should also be considered, are but sectaries in Scotland and depend for their

protection in the same toleration which has now been extended to Unitarians. It would probably startle even the defender, however, if it was made a question whether a legacy could be recovered, or a loan reclaimed for the purpose of building or repairing an Episcopal chapel, or paying the salary of an officiating clergyman."

The special interest of this case is that the congregation of General Baptists formed in Perth as the result of the legacy thus bequeathed was the only Unitarian Baptist congregation ever formed in Scotland. In 1838, it had eleven members, and seems to have dispersed shortly after the hearing of this action in 1841. The General Baptist Assembly at that time had seventy congregations under its inspection. To-day, it is reduced to half-a-dozen, all of which are also connected to the General Assembly of Unitarian and Free Christian Churches. It is appropriate that the one General Baptist Church in Scotland should have been located in Perth, which has been notable for its hospitality to smaller sects—Lifters, Licensed Episcopalians, Protestors, Unitarians, Glasites of two communions, Old Scots Independents, and Scots Baptists having at different times raised a following in this ancient city.